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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT J. MODEEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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Counsel for Petitioner

NOVEMBER 1988

QUESTION PRESENTED

Was petitioner denied due process of law when he made pretrial restitution based upon the incorrect belief that the restitution would result in a lesser forum of criminal disposition?[1]

[1] This question and petition are presented to this Honorable Court pursuant to Article 70(c)(1) of the Uniform Code of Military Justice, 10 U.S.C. § 870(c)(1) (Supp III, 1985), and *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Robert J. Modeen, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 30, 1988.

OPINIONS BELOW

The initial, unreported, decision of the United States Air Force Court of Military Review was rendered on October 14, 1987, and is reproduced in the Appendix to this petition ("Pet. App.") at page 2a. *United States v. Modeen,* ACM 25972 (A.F.C.M.R. Oct. 18, 1987). The decision of the United States Court of Military Appeals is reported as *United States v. Modeen,* No. 59226/AF (C.M.A. Sept. 30, 1988), Pet. App. 1a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp III 1985) and 10 U.S.C. § 867(h) (Supp III 1985). The judgment of the United States Court of Military Appeals was entered on September 30, 1988.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner was tried by a general court-martial, military judge alone, in November, 1986, at Wurtsmith Air Force Base, Michigan. Contrary to his pleas, he was found guilty of falsely signing an official record and larceny.

Petitioner was sentenced to a bad conduct discharge, confinement for 11 months, forfeiture of all pay for 9 months, and reduction to airman basic (E-1). The convening authority only approved so much of the sentence as provides for a bad conduct discharge, confinement for 6 months, forfeitures of $426.00 pay per month for 6 months and reduction to airman basic (E-1).

Subsequent to his trial, the petitioner submitted written matters to the general court-martial convening authority wherein he asserted that his pretrial restitution was secured by false promises. That is, the petitioner maintained that attorneys from the base legal office promised, on behalf of the special court-martial convening authority, that in exchange for full restitution (approximately $6,000.00) he would be tried by a special court-martial as opposed to a general court-martial.[2] The petitioner did, in fact, make the referenced restitution.

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[2] A general court-martial may try any person subject to the Uniform Code of Military Justice ("Code") for any offense made punishable under the Code. A general court-martial may adjudge any punishment within the limits authorized by the Code. Whereas, a

As a result of these written submissions, the general court-martial convening authority directed a post-trial hearing. Upon the completion of the hearing the military judge found that attorneys from the base legal office had told the petitioner that if restitution were made by October 3, 1986, they would recommend a special court-martial to the special court-martial convening authority. Likewise, the military judge found that the petitioner made full restitution on October 3, 1986, and that the legal office did recommend a special court-martial. However, the military judge also found that the special court-martial convening authority was unaware of these arrangements, and that he recommended a general court-martial on October 2, 1986.

Upon reviewing the record of trial and the record of the post-trial proceedings, the Air Force Court of Military Review held that there was no promise to have the case tried by a special court-martial in exchange for full restitution.

The Court of Military Appeals agreed with the lower court, and found there was no factual basis to support the petitioner's contention that he had been promised a special court-martial in return for full restitution.

REASONS FOR GRANTING THE WRIT

In the instant case, the petitioner made pretrial restitution based upon statements from attorneys who were associated with the prosecution. While the lower courts found there was no promise to recommend a special court-martial, the restitution was nonetheless motivated by a belief that it would limit the petitioner's sentencing ex-

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special court-martial may only adjudge limited sentences. That is, a special court-martial may impose a maximum punishment of a bad conduct discharge, confinement for 6 months, forfeitures of two-thirds pay per month for 6 months and reduction to E-1.

posure. Moreover, this mistaken belief was directly derived from representations that were communicated to the petitioner. As a result, this case creates a perception which is contrary to fairness and due process of law.

The essential guarantee of the Fifth Amendment's due process clause is that the government may not imprison a person except in accordance with fair procedures. The military has long recognized this principle under the rubric of military due process. *United States v. Clay,* 1 C.M.R. 74 (C.M.A. 1951). Military appellate courts have been so sensitive to this issue that they have held that the military judicial system must avoid even the appearance of impropriety. *United States v. Walters,* 16 C.M.R. 74 (C.M.A. 1954). Likewise, military courts have attempted to instill public confidence in the judicial system by measures which insure fairness. *United States v. Stringer,* 17 C.M.R. 122 (C.M.A. 1954).

Clearly, the evidence in this case reveals anything but fairness. In the highly disciplined environment of the military, it is absolutely critical that the judicial system be above reproach. However, the petitioner was not the beneficiary of such fairness. Instead, his case is punctuated with shadows of evil and bad faith. Accordingly, the appearance of impropriety is so severe as to have denied the petitioner due process of law.

CONCLUSION

The petitioner submits that he has suffered a denial of due process of law. Therefore, his petition for a writ of certiorari should be granted.

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Counsel for Petitioner

NOVEMBER 1988 –

APPENDICIES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 59226/AF
CMR Dkt. No. 25972

UNITED STATES, APPELLEE

v.

ROBERT J. MODEEN (077-58-4593), APPELLANT

ORDER

On further consideration of the granted issue (26 M.J. 161) we conclude that there is no factual basis to support appellant's contention that he was promised that his case would be referred to a special court-martial in return for his restitution of the proceeds of his crime. Accordingly, it is, by the Court, this 30th day of September, 1988

ORDERED:

That the decision of the United States Air Force Court of Military Review dated 14 October 1987, is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 25972

UNITED STATES

v.

STAFF SERGEANT ROBERT J. MODEEN FR 077-58-4593
UNITED STATES AIR FORCE

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14 OCTOBER 1987

Sentence adjudged 11 November 1986 by GCM convened at Wurtsmith Air Force Base, Michigan. Military Judge: DAVID R. BRENNAN (sitting alone).

Approved Sentence: Bad conduct discharge, confinement for six (6) months, forfeiture of four hundred twenty-six dollars ($426.00) per month for six (6) months and reduction to airman basic.

Appellate Counsel for the Appellant: COLONEL LEO L. SERGI and MAJOR WILLIAM J. REICHART.
Appellate Counsel for the United States: COLONEL JOE R. LAMPORT, LIEUTENANT COLONEL ROBERT E. GIOVAGNONI, CAPTAIN MARC VAN NUYS, and CAPTAIN ROBERT L. MARCONI, USAFR.

Before

HODGSON, FORAY and HOLTE
Appellate Military Judges

DECISION

PER CURIAM:

The appellant, contrary to his pleas, was convicted by a judge alone general court-martial, of one specification of falsely signing an official statement and one specification of larceny. Both charges stemmed from receiving BAQ allowance at the married rate during a time he was not married. He was sentenced to a bad conduct discharge, confinement for 11 months, forfeiture of all pay and allowances and reduction to the grade of E-1. The approved sentence extended to a bad conduct discharge, forfeiture of $426.00 per month for six months, confinement for six months and reduction to airman basic.

Subsequent to the trial the appellant forwarded clemency matters to the general court-martial convening authority. Included were affidavits from the appellant, the base Area Defense Administrator (ADA), and the defense counsel. The appellant and the ADA stated that the appellant had been promised that if he made full restitution (which he in fact did) the case would be tried by a special court-martial rather than a general court-martial. The defense counsel's version is different in that he concluded from what was said that if restitution was made prior to the Article 32 investigation being forwarded to the general court-martial convening authority the base the staff judge advocate would recommend to the special court-martial convening authority that the case be tried by a special court-martial.

Upon receipt of these clemency matters the general court-martial convening authority directed a post-trial Article 39(a) session pursuant to R.C.M. 1102 to be conducted in accordance with *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

The following facts, relevant to the assigned error, were established at the post-trial Article 39(a) session.

Prior to the Article 32, U.C.M.J., investigation, but subsequent to the appellant being charged, the defense counsel approached the chief of military justice with a proposal of a special court-martial if full restitution was made. At the conclusion of this discussion it was his understanding that if such restitution was made a recommendation for a special court-martial would be made to the special court-martial convening authority by the staff judge advocate's office. It is clear from the testimony of the special court-martial authority that he knew nothing about a promise of a special court-martial if restitution was made. It is clear from the testimony of the other witnesses who included the staff judge advocate, the chief of military justice, and in fact, the appellant himself, that there was a promise made by the staff judge advocate's office that if restitution was made by the close of business on 3 October 1986, that office would recommend to the special court-martial convening authority that the case be tried by special court-martial. The appellant did in fact make restitution late in the afternoon on 3 October. However, the Article 32 investigation had been dispatched to the general court-martial convening authority on the afternoon of 2 October 1986. At the time the staff judge advocate took the case to the special court-martial convening authority for action on 2 October he informed the commander to consider restitution as being made and recommended that the case be tried by special court-martial.

The appellant alleges that his conviction by general court-martial was illegal and should be set aside because of a prior command promise to try the case by special court-martial if restitution was made. We disagree. Having examined the record of trial and the record of the post trial

hearing we conclude, as did the military judge conducting the post trial hearing, that in fact there was no promise to the appellant to have the case tried by a special court-martial if full restitution was made. Article 66, Uniform Code Of Military Justice.

The remaining invited issues are decided against the appellant.

Having examined the record of trial and having concluded that the findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed, the approved findings and sentence are

AFFIRMED.

OFFICIAL:

PAMELA HOWARD

PAMELA HOWARD
Captain, USAF
Chief Commissioner

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